



CHAPTER IX: TERMINATION OF PARENTAL RIGHTS

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A. Purpose

The voluntary or involuntary termination of parental rights severs all legal familial rights and ties between a child and the birth parents, freeing the child for adoption. After termination, parents are no longer entitled to notice of future court proceedings concerning the child. Termination of parental rights ends the duty to provide continuing child support and the legal right to visit the child.¹

About one-third of foster children do not return to their birth parents. Approximately 21%, or one in five, adjudicated neglected and abused children experience the severing of parental rights and adoption. Furthermore, the United States Department of Health and Human Services (USDHHS) estimates that of the foster children who are adopted, 78% will be adopted by their foster parents or relatives.² Clearly, there is a significant percentage of children in the child protection system who require the termination of parental rights in order to see to their best interests, safety, health and well-being.

Termination creates a possibility for a new parental relationship and permanent family for children who cannot be safely reunified with their biological parents. It is consistent with the key foundational principle that *"all children have the right to a healthy and safe childhood in a nurturing, permanent family..."*

Termination of parental rights cases are among the most difficult and challenging a judge can face. Termination proceedings must be conducted with great care and with full procedural protections for parents and children. When judges have carefully followed the preparatory steps described in this Manual, the court has prepared a solid foundation upon which to build the justification of termination of parental rights for children who cannot be reunified and to provide the child with a new family through adoption.

Under ASFA, the court must make reasonable efforts toward adoption findings from the permanency hearing until permanency is achieved. This suggests that the termination of parental rights trial becomes a *two-part consecutive process*: first, termination issues are addressed; second, if termination of parental rights is granted, reasonable efforts toward adoption findings should be made.

B. Timing of the Process

1. Timing Issues Regarding the Decision to Pursue Termination of Parental Rights (TPR)

There are certain circumstances under which it is appropriate to proceed directly to termination of parental rights when the original complaint of neglect or abuse is adjudicated. Reasonable

¹ Adoption with contact agreements can be made between adopting parents and birth parents; however, birth parents are not legally entitled to such an agreement and such agreements are not enforceable by a court in Idaho.

² UNITED STATES GENERAL ACCOUNTING OFFICE, *FOSTER CARE: HHS COULD BETTER FACILITATE THE INTERJURISDICTIONAL ADOPTION PROCESS* (1999).

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efforts to reunify the family need not be pursued if aggravating circumstances have been found.³ In such a situation, Idaho law requires that the petition to terminate parental rights must be filed within 60 days of the finding of aggravated circumstances. In addition, if the court finds that an infant has been abandoned, a petition to terminate parental rights must be filed within 60 days.⁴

Under ASFA, termination of parental rights proceedings must be filed or joined (if filed by another party) *by the state* for any child who has been in foster care for 15 of the most recent 22 months.⁵ This requirement was included because of the documented substantial and unjustified delays in many states in legally freeing children for adoption—delays caused by both child welfare agencies as well as juvenile and family courts.⁶

Termination of parental rights petitions should be filed at any time in a case when it is clear that reunification cannot occur. The petition to terminate parental rights must be filed as a motion in the pending child protection case.⁷ A new case

Under ASFA, at the same time that the state is filing a termination petition under any grounds, the social services agency is required to concurrently identify, recruit, process, and approve a qualified adoptive family.

should not be initiated. Moreover, it is not appropriate to wait for the permanency hearing to file the TPR petition when it can be documented well in advance of the scheduled hearing date that termination is the necessary direction of the case.

The purpose of this requirement is to expedite the process of locating a new family for the child by eliminating any delay between the agency recommendation for termination of parental rights and the agency initiation of the recruitment process.

These timing requirements should not be misinterpreted, however, to mean that ASFA requires an adopting family to be found prior to the court's decision regarding termination of parental rights. Although some judges and other professionals have been disinclined in the past to terminate parental rights unless they could be sure that a new family would be found for the child, *terminations should not be delayed while waiting for adoptive families to be identified*. There are several reasons for not delaying:

- ◆ Many families interested in adopting hesitate to commit to a specific child if the child is not yet legally free for adoption.
- ◆ There is a significant difference between terminating rights and terminating relationships, and one does not necessarily require the other. Adoption with contact is often in the best interests of the child and enables relationships to continue with family members and other significant persons in the child's life after termination of parental rights has occurred.

³ Idaho Code § 16-1619(6)(d). More information about aggravated circumstances is found in Chapter V. Note that for ICWA cases, it is never appropriate or legally permissible to proceed in this manner unless active efforts to rehabilitate the family have been offered and have subsequently failed.

⁴ Idaho Code § 16-1624.

⁵ 42 U.S.C. § 675(5)(F).

⁶ MARK HARDIN, MANDATORY TERMINATION OF PARENTAL RIGHTS PETITIONS: "COMPELLING REASONS" AND OTHER EXCEPTIONS UNDER THE ADOPTION AND SAFE FAMILIES ACT (ABA Center on Children and the Law, January 1999).

⁷ Idaho Code § 16-1624.

- ◆ Given the many examples of successful recruitment of adopting families for all types of children with all types of needs, it is reasonable to believe in the adoptability of all children. If an adopting family has been found for a child with similar characteristics, why not believe that a family can be found for this child?

2. Timing Issues Regarding Filing and Hearing the TPR Petition

Good practice dictates that the petition to terminate parental rights be filed with the court and served on all parties *no later than* 30 days after the agency or court makes a determination that the filing is appropriate. Good practice dictates that the trial, if necessary, should begin within 90 days of the date the petition is filed and that the court deliver its written decision to all parties *no later than* 14 days after the completion of the trial.

As previously noted, where there has been a finding of aggravated circumstances, the termination of parental rights petition must be filed within 60 days of the finding under Idaho law.

In addition, where a child has been taken to a safe haven under the Idaho Safe Haven Act, IDHW must petition to terminate parental rights as soon as possible after the initial thirty (30) day investigation period.⁸

C. Best Practices for Reducing Delays from Trials and Appeals

There are two additional best practices that courts can use to expedite the achievement of timely permanency and to design the best possible permanent plan for a child who cannot be reunified. Various jurisdictions have demonstrated significant success in avoiding trials on termination of parental rights when using these practices. These practices help a family accept adoption as being in the best interests of the child, thereby avoiding appeals after termination of parental rights. These practices are mediation (and other types of pretrial negotiations) and consideration of adoption with contact.

1. Mediation and other Pretrial Negotiations

Although there are technical variations between mediation and pretrial (or settlement) conferences, all have the potential to accomplish the same purpose -- to achieve voluntary termination of parental rights and settlement of related issues and to avoid costly and time consuming trials and subsequent appeals. These results are achieved by:

- ◆ Providing parents with factual information that offers a realistic prospect of trial outcome and helping to separate personal issues and biases from factual information;
- ◆ Giving parents a sense of participation in future planning for the child and a sense of significance and closure with dignity that will no longer be available if the case goes to trial;
- ◆ Helping the child, parents, and relatives to understand the importance of one stable home for the child and to overcome objections to terminating parental rights, opening the door to relative adoption; and
- ◆ Providing a forum to discuss the appropriateness of adoption with contact and to develop a proposed plan for the contact.

⁸ Idaho Code § 39-8205(5).

Of these negotiating options, mediation has the best chance of achieving all of these results. Mediators must be highly-trained, experienced and skilled professionals who have credibility with the court and related professionals. Family members and other participants must perceive them as neutral and as having the best interests of the child and family at heart. All parties, their attorneys, and other relevant case participants, including the child if developmentally appropriate, are included in the mediation process.

In some jurisdictions, mediation programs have produced full or partial pretrial agreements in 90% of mediated cases.

When used at the point of termination of parental rights, mediation programs should be court-based or court-supervised and have strong judicial and interdisciplinary support. Mediated agreements must be specific and detailed and made a part of the court record.

Pretrial and settlement conferences can occur with or without judicial supervision. When there are disputes concerning discovery, evidentiary, or other legal issues, judicial involvement is preferred. As with mediation, all parties, including age-appropriate children and their attorneys, should be involved.

Even when mediation and other negotiations fail to produce agreement and avoid trial, they can help narrow the focus of the trial, shorten its duration, and ensure that all parties are prepared well in advance of the trial.

2. Adoption With Contact

Adoption with contact is the second practice that courts can use to design the best possible permanent plan for a child, and often, in the process, avoid a trial. Historically, adoptions have varied in the degree of confidentiality that has existed between birth parents, adopting parents, and the child. Prior to the 1930s, confidentiality was the exception. From the 1930s forward, the practice of confidentiality among all parties became the norm. Even when older children were adopted, courts and child welfare agencies often attempted to maintain total separation between the child, the biological parents, and the adopting family.

When older children are adopted, however, the question of confidentiality is often moot as the child knows his or her parents and relatives and where they live. The question often becomes whether or not the child, birth parent, and relatives are going to have sanctioned or unsanctioned contact.

Because this Manual deals with neglected and abused children who are often old enough to remember their biological parents, relatives, and others with whom they have had relationships, the recommendation is that adoption with contact always be *considered*.

Adoption with contact describes a wide variety of arrangements among birth parents, siblings, relatives (and other significant individuals from the child's past relationships), the child, and the adopting family. This contact can occur both prior to and after the adoption. Examples of this range of contact include:

- ◆ Biological parents do not know who the adopting family is but send cards or letters using an intermediary. The adopting family decides whether to share the communications from the biological parent(s) with the child. The child may also send return letters and pictures through the intermediary.
- ◆ Biological parents receive pictures and annual progress reports from the adopting family.
- ◆ Biological parents know the identity of the adopting family and are permitted occasional or regular visitation with the child.

Small degrees of contact are often sufficient to facilitate obtaining voluntary relinquishments of parental rights and to consequently avoid trials and lengthy appeals. In most of the jurisdictions that regularly permit some type of adoption with contact, the parent understands that going to trial probably means losing any opportunity for contact. However, the determining factor as to whether adoption with contact is appropriate *must always be the best interests of the child and not the desires of the adults or the hope of avoiding a trial.*

Examples of situations where continued contact with the birth parents after adoption may be in the child's best interests are:⁹

- ◆ A child has a good relationship with a developmentally, emotionally, or physically disabled parent who is not able to care for the child.
- ◆ An older child wishes to continue a relationship with birth parents and the child will benefit from ongoing communication or visits.
- ◆ The adopting foster parents have a cooperative relationship with the birth parent that is likely to continue after the adoption.
- ◆ A child has siblings still living with the birth parents.

When considering adoption with contact, it is important to consider the enforceability of any agreement. Less than a third of the states have adoption statutes that permit contact between birth parents and the child after adoption. Idaho does not have a specific statute providing for post-adoption contact at this time. Nonetheless, contact arrangements between birth parents and adopting parents may be entered into voluntarily.

It is important to note that adoption with contact does not change the fact that the adopting parents are the legal parents of the child and are ultimately in control. If either the adopting parents, the biological parents, or any other person violates the contact agreement, mediation is a recommended method to resolve disputes. The mediation process would require the adopting family to agree to participate in the mediation session. It would not, however, require the adopting family to accept any proposed outcome.

The most effective adoption with contact agreements include the following characteristics:

- ◆ legally approved by case law or statute;
- ◆ negotiated based upon full disclosure to all parties;
- ◆ agreed to by a child of sufficient age and maturity to specify a position on the matter (or by the guardian *ad litem* for the child if of insufficient age);

⁹ D. Baker and C. Vick, *The Child Advocate's Legal Guide* (North American Council on Adoptable Children, 1995).

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- ◆ clearly set out in writing and incorporated into the adoption decree;
- ◆ modifiable based upon changes in circumstance's and the best interests of the child; and
- ◆ enforceable, but not grounds for setting aside the adoption.

Idaho law does not specifically provide for adoption with contact agreements. As a result, these agreements are purely voluntary and cannot be later enforced by a court if one of the parties violates the provisions of the agreement.

D. Filing the Termination of Parental Rights Petition

1. Content of the Petition

The termination of parental rights petition must be complete and definite and provide fair notice to the parties. Petitions typically address issues such as agency efforts to work with parents; parents' cooperation with the agency; parents' condition, behavior progress, and improvements; and the effects of foster placement on the child. Although facts may be alleged in summary form due to the breadth of material at issue, the allegations must be sufficiently precise to give the parties notice of the issues at stake. The court should require that the petition cite the statutory grounds relied upon and provide a summary of facts in support of each statutory ground. When the child is an Indian child, the petition must rely upon 25 U.S.C. §1912¹⁰ and should include a summary of facts supporting those requisite findings. The petition must be filed with the court and served on all parties.

Idaho law requires the petition to contain the following information:¹¹

- ◆ the name and place of residence of the petitioner;
- ◆ the name, sex, date and place of birth, and residence of the child;
- ◆ the basis for the court's jurisdiction;
- ◆ the relationship of the petitioner to the child or the fact that no relationship exists;
- ◆ the names, addresses, dates of birth of the parents; and where the child is illegitimate, the names, addresses, and dates of birth of both parents if known to the petitioner;
- ◆ where the child's parent is a minor, the names and addresses of the minor's parents or guardian; and where the child has no parent or guardian, "the relatives of the child to and including the second degree of kindred";
- ◆ the name and address of the person having legal custody or guardianship of the person or acting in loco parentis to the child or the authorized agency having legal custody or providing care for the child;
- ◆ the grounds on which termination of the parental relationship is sought;
- ◆ the names and addresses of the persons and authorized agency or officer thereof to whom or to which legal custody or guardianship of the person of the child might be transferred; and
- ◆ a list of the assets of the child together with a statement of the value thereof.

Where IDHW is the petitioner in the termination of parental case, the petition must be accompanied by a written report of the department's investigation.¹² This social study should

¹⁰ See Chapter XI on the Indian Child Welfare Act, below.

¹¹ Idaho Code § 16-2006

include the circumstances of the petition, results of the investigation and the present condition of the child and parents, proposed plans for the child, and other relevant facts. The report should include recommendations with supporting reasons as to why the parent-child relationship should be terminated. Where the parent is a minor, the report should contain an explanation of the child's contact with the parents of the minor.

2. Notice and Hearing

Once a petition has been filed, the court must set a time and place for hearing and must notify the appropriate individuals. The hearing may not be scheduled more than ten days prior to the service of notice on the parents or ten days after the last date that notice is provided by publication.¹³ The question of who is entitled to notice of a parental termination action is complex. Idaho Code section 16-2007 establishes the notice requirements for parental termination actions. In addition to specifying notice to certain specified persons and entities, section 16-2007 requires that notice be provided to any person who would be entitled to notice of an adoption proceeding under Idaho Code section 16-1505. The adoption notice provision, § 16-1505, provides for notice of an adoption proceeding to certain specified individuals, but also provides that any person or agency whose consent to an adoption proceeding would be required under Idaho Code § 15-1504 is also entitled to notice of the proceeding. The upshot of this web of notice proceedings is that any person or entity named in the parental termination notice provision (Idaho Code § 16-2007), the adoption notice provision (Idaho Code § 16-1505), or the adoption consent provision (Idaho Code § 16-1505) is entitled to notice of a parental termination action.¹⁴

Idaho law provides for the execution of a Consent to Termination of Parental Rights and a Waiver of Notice and Appearance in a termination of parental rights proceeding.¹⁵ When the overlapping notice provisions of the adoption and parental termination provisions are considered together, and assuming a prospective party has not signed a Consent to Termination or a Waiver of Notice and Appearance, notice must be provided to:

- ✓ the petitioner;
- ✓ the child, if he or she is over age 12;
- ✓ the mother of the child if the parents are unmarried;
- ✓ the father or putative father of the child who has not signed a consent to termination pursuant to Idaho Code § 16-2005(4) or a Waiver of Notice and Appearance pursuant to Idaho Code § 16-1007(3) and whose rights have not been previously terminated, if he
 - ◆ is currently married to the mother or was married to the mother at the time she executed a Consent to Termination of Parental Rights or otherwise relinquished the child;
 - ◆ has been adjudicated the father of the child prior to the execution of a Consent to Termination by the mother;
 - ◆ has filed notice of the commencement of a paternity action and complied with Idaho Code § 16-1513;

¹² Idaho Code § 16-2008.

¹³ Idaho Code §§ 16-1504, 16-1505 and 16-2007.

¹⁴ Idaho Code § 16-2007.

¹⁵ Idaho Code § 16-2005(4) and Idaho Code § 16-2007(3).

- ◆ is recorded on the birth certificate as the child's father with the knowledge and consent of the mother;
 - ◆ is openly living in the same household with the child and holding himself out as the child's father at the time the mother executes a consent or relinquishment;
 - ◆ has filed a voluntary acknowledgment of paternity pursuant to Idaho Code § 7-1106;
 - ◆ has developed a substantial relationship with the child who is more than 6 months old and has taken responsibility for the child's future and financial support pursuant to Idaho Code § 16-1504(2)(a); or
 - ◆ has developed a substantial relationship with a child under the age of 6 months and has commenced paternity proceedings and complied with Idaho Code § 16-1504(b).
- ✓ the legally-appointed guardian of the person or custodian of the child;
 - ✓ the guardian *ad litem* for the child or for any other party;
 - ✓ any person "standing in loco parentis" to the child;
 - ✓ the child's nearest blood relative named in the petition if service cannot be had on the parent or guardian;¹⁶
 - ✓ IDHW.

Notice to the parents or guardians must be by personal service. If personal service is unsuccessful, the court should order service by registered or certified mail to the last known address of the person and by publication once a week for three consecutive weeks in a newspaper designated by the court. The hearing should take place no sooner than 10 days after service of the notice or 10 days after the last date of publication.

Notice may be waived by a parent in an acknowledged writing so long as the parent has been apprised of the consequences of termination.

3. The Court's Response to the Filing of the Petition

a. Appointment of Counsel

The court must ensure that all parties are represented by counsel. Although the United States Supreme Court has held that parents do not have a constitutionally protected right to counsel under the U.S. Constitution in parental termination actions,¹⁷ Idaho law provides for appointment of counsel for parents who are indigent and guardians in such actions.¹⁸

Idaho law confers exclusive jurisdiction over the parental termination action upon the court in a connected Child Protective Act case.¹⁹ Furthermore, Idaho Code § 16-1624 provides that a parental termination petition "shall" be filed in the Child Protective Act case. All counsel representing the parties in the CPA proceeding should still be assigned to the case. Because the Parental termination proceeding is part and parcel of the CPA proceeding, the appointment of the

¹⁶ The provisions for notice to a person standing "in loco parentis" and to near blood relatives are found in Idaho Code § 16-2007.

¹⁷ *Lassiter v. Dept. of Soc. Servs.*, 542 U.S. 18 (1981).

¹⁸ Idaho Code § 16-2009.

¹⁹ Idaho Code § 16-2003.

child's guardian *ad litem* should also be continued. If for some reason these appointments are not continued, the court must expeditiously appoint new counsel for any indigent parties and guardians *ad litem* for the child and others, where appropriate. Because of the court's review of this issue at the recent permanency hearing, another hearing should not be necessary to make these determinations. Immediately upon the filing of the petition, the court should review issues of counsel so that counsel can be present at the first pretrial hearing.

b. Pretrial

The court should immediately set a pretrial date within 30 days. The pretrial and all of the subsequent hearings, unless prohibited by statute, should be scheduled before the same judge who has handled the case since the original filing. At the pretrial, the court should establish all of the following additional dates:

- ◆ The date for discovery to be completed, which is sufficiently in advance of the mediation or settlement conference to allow all parties to review the material in full.
- ◆ The date for mediation, pretrial, or settlement conference. This date should be far enough in advance of the trial date so that if significant progress is made, but another meeting is required to reach full agreement, there is adequate time for a second meeting. The recommended time frame for this meeting is two to four weeks prior to the trial date. Counsel must notify the court immediately following the meeting as to whether agreement was reached or whether the trial will proceed as scheduled.
- ◆ A final pretrial date, if necessary.
- ◆ The trial dates. Trial dates should be consecutive and the trial should begin within 90 days of the filing of the petition.²⁰
- ◆ The judge should also reserve time on his or her personal calendar within seven days after the final trial day for the writing of the TPR findings and conclusions.

The court must establish and enforce strict expectations with regards to all parties committing to the dates scheduled at the pretrial. Barring extraordinary circumstance, such as serious illness or death of close relatives, everyone should be held to these dates.

In addition, if a petition for adoption is not filed in conjunction with the parental termination action, the court may order IDHW Bureau of Child Support Enforcement to submit a written financial analysis report within 30 days detailing the un-reimbursed public assistance monies paid by the state of Idaho on behalf of the child.²¹ The report, if ordered, should contain recommendations for repayment and provisions for the future support of the child.

E. Conducting the Hearing

At this point in the court process, one of two circumstances will exist—either the parents will have voluntarily relinquished their parental rights or the case will move to trial. In each instance, the court should address questions of whether parental rights should be terminated,

²⁰ If the trial cannot be completed in the allotted time, judges should give priority to finishing the trial as soon as possible. Dates for completion should be set before the parties leave the courtroom. If judges are able to hold one or two days open each month for such “emergencies,” no trial should have to be continued more than 30 days.

²¹ Idaho Code § 16-2008.

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whether termination and adoption are in the best interests of the child, and whether reasonable efforts are being made toward adoption and to finalize the permanent plan.

It is important to note that when pretrial negotiations result in an agreement that the patients will voluntarily relinquish parental rights, counsel must notify the court immediately. The court can then use the beginning portion of the dates previously set for the final pretrial or the trial for the final hearing on the motion to terminate parental rights to take the parents' voluntary consent. Remaining trial dates and time can be freed for other court business.

Idaho law provides that the termination of parental rights case should be heard by the court without a jury and that it must be closed to the general public. Stenographic or mechanical recording of the hearing is required. Furthermore, the court's findings must be based on clear and convincing evidence.²² However, Idaho law also provides that "relevant and material information of any sort," including reports, studies, and examinations may be relied on to the extent of its probative value.²³

1. Information the Court Should Have

In both instances of voluntary relinquishment and trial, the background information the court needs before going into the hearing is the same. Prior to the hearing, the judicial officer should review the court file, which should provide the following information for each child and parent in the case:

- ◆ reports, case plan, findings, orders, and a chronology of the child's out-of-home placements and treatment;
- ◆ the age of the child and needs at removal;
- ◆ a current report of the child's status and well being;
- ◆ circumstances leading to the filing of a termination of parental rights petition; and
- ◆ an IDHW report of concurrent efforts to identify, recruit, and place the child with an adoptive family.

2. Who Should be Present

The following list of persons to be present applies to both voluntary relinquishments and trials (with the one exception that when the case goes to trial, all trial witnesses are also included):

- ◆ the judge who has monitored the case from the first hearing;
- ◆ the child;
- ◆ parent(s);
- ◆ attorneys for the parent(s);
- ◆ if an Indian child, the child's tribe, the attorney for the child's tribe, if any, and the Indian custodian;
- ◆ assigned IDHW caseworker(s);²⁴
- ◆ prosecuting attorney or deputy attorney general;

²² Idaho Code § 16-2009.

²³ Idaho Code § 16-2009.

²⁴ If an adoption caseworker has been assigned to the case, that person should be present along with the ongoing caseworker.

- ◆ guardian *ad litem* for the child, whether attorney, social worker or other paid non-attorney, or CASA;
- ◆ attorney for the child, if applicable;
- ◆ foster parent(s),²⁵ legal risk foster parent(s), or adoptive parent(s);
- ◆ relatives who are caretakers of the child or who are involved in an adoption with contact agreement, when applicable;
- ◆ court reporter or suitable recording technology; and
- ◆ court security and other court staff.

F. Questions That Must be Answered to Determine Whether Grounds Exist for Termination of Parental Rights and Whether Termination and Adoption are in the Best Interests of The Child

1. When Mediation Results in Consent to Terminate Parental Rights

The seriousness of termination of parental rights and the importance of avoiding collateral attacks on the decree make it important to make sure that whenever the court is involved in voluntary relinquishment of parental rights, the court ensures that the consent is *voluntary and informed*. At the hearing, the judge should take the time to make sure that each parent understands the consequences of termination and the right to a trial. Among the questions judges should ask are:

- ◆ Was the parental consent to relinquishment voluntary and informed?
- ◆ Have both biological parents consented to relinquishment?
- ◆ Why is relinquishment and adoption in the best interests of the child?
- ◆ Is there a recommendation for adoption with contact? How is this recommendation, or lack thereof, in the best interests of the child?

For Indian children, the court must comply with the requirements of the ICWA, 25 U.S.C. § 1913, which states that voluntary relinquishments must be:

- ◆ Executed in writing;
- ◆ Recorded before a judge and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
- ◆ Certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood; and
- ◆ Any consent given prior to or within 10 days after the birth of the child shall not be valid.²⁶

2. When the Case Goes to Trial

When mediation or other pretrial negotiations have not produced an agreement for voluntary relinquishment of parental rights, the court must be ready to proceed with the trial. The

²⁵ Per ASFA, foster parents are entitled to notice and an opportunity to be heard. They are often the most informed individuals to provide a day-by-day report of the child's status, health, and well-being.

²⁶ These provisions of ICWA are discussed in detail in Chapter XI of this Manual.

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concurrent dates for the trial have already been set, counsel has been appointed, and discovery completed (see section D: Filing the TPR Petition).

Terminations of parental rights should be based upon clear and convincing evidence.²⁷ Pursuant to Idaho Code § 16-2005, the grounds for termination in Idaho are:

- ◆ abandonment of the child by willfully having failed to maintain a normal relationship, including failure to maintain reasonable support and regular personal contact;
- ◆ failure to maintain a normal relationship without just cause for one year is prima facie evidence of abandonment;²⁸
- ◆ neglect or abuse of the child such that the child “lacks the parental care necessary for his health, morals and well-being”;
- ◆ the parent is unable to discharge her or his parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that the condition will continue for a prolonged period of time and will be injurious to the child’s health, morals, or well-being; or
- ◆ where termination is filed by a parent or through an authorized agency, if termination is found to be in the best interests of the child.

Idaho law provides that there is a rebuttable presumption that termination of parental rights is in the child’s best interests in any of the following situations:²⁹

- ◆ the parent has caused the child to be conceived as a result of rape, incest, lewd conduct with a minor under 16, or sexual abuse of a child under 16;
- ◆ a parent murdered or intentionally killed the other parent of the child;
- ◆ a parent has been convicted of murder or voluntary manslaughter of a sibling of the child or has aided, abetted, conspired or solicited to commit such murder or voluntary manslaughter;
- ◆ a parent has been convicted of a felony assault and battery which resulted in serious bodily injury to the child or a sibling;
- ◆ a parent is incarcerated with no possibility of parole; or
- ◆ a court determines the child is an abandoned infant.

Questions that must be answered when termination motions go to trial include:

- ◆ Were all parties properly identified and served?
- ◆ Does the evidence presented show that statutory grounds for termination of parental rights exist?³⁰
- ◆ Were reasonable efforts made to reunify?³¹

²⁷ ICWA requires the burden of proof in a termination proceeding to be beyond a reasonable doubt.

²⁸ Idaho Code § 16-2005(a) also provides that where termination is sought by a grandparent seeking to adopt the child, willful failure to maintain a normal parental relationship for 6 months is prima facie evidence of abandonment.

²⁹ Idaho Code § 16-2005(h)

³⁰ Under ICWA, if the child is an Indian child, in addition to any state requirements the court must determine beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

³¹ Under ICWA, if the child is an Indian child, in addition to any state requirements the court must determine that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.

- ◆ Is termination of parental rights in the best interests of the child?

G. Special Provisions for Terminating Parental Rights of Unwed Fathers

Pursuant to Idaho law, if the child is born out of wedlock, the father of the child is required to file a notice of commencement of paternity action with the Vital Statistics Unit of IDHW.³² This notice may be filed before the birth of the child. It must be filed before the child is placed for adoption in the home of prospective adoptive parents or before the commencement of any action to terminate parental rights, whichever comes first. In addition to filing the notice, the unwed father must commence a paternity action.

If an unwed father fails to file the notice of commencement of paternity actions he is deemed to have surrendered his rights to paternity of the child. Failure to file the notices constitutes an abandonment of the child. Filing of the notice and commencement of the action constitutes prima facie evidence of paternity in an action to establish paternity.

In a situation in which the unwed father has established a relationship with the child at some point during the child's life or where the unwed father has not had meaningful opportunity to establish such a relationship, it would be dangerous to rely on his failure to file the notice prescribed by §16-1513 because of its questionable constitutionality. A discussion of the potential constitutional issues with the statute is included in Appendix B. In such a situation, the recommended best practice would be to provide notice and to proceed with parental termination as if §16-1513 had not been adopted. As a result, abandonment by an unwed father should be established under the provisions of §16-2005 and should not be presumed under § 16-1513.

H. Questions that Must be Answered to Determine Whether Reasonable Efforts are Being Made Toward Adoption and to Finalize the Permanent Plan

At this point in the proceedings, the court has addressed the first set of necessary questions—it has determined whether grounds exist for termination of parental rights and whether termination and adoption are in the best interests of the child. Upon finding that facts exist to meet these two criteria, termination of parental rights should be granted.

Then, in a follow-up hearing without the birth parents present, the court should proceed to the second question determining whether reasonable efforts have been and will be made toward adoption and finalization of the permanent plan by asking the following sets of questions (depending on the child's situation):

1. In All Cases, What are the Child's Special Needs?

- ◆ Current health and educational information;
- ◆ A description of the child's current placement;
- ◆ Description of the services that have been provided to the child, the progress the child has made, and the issues still to be addressed, including cultural needs; and
- ◆ Has the child received counseling with regard to termination of parental rights and how is the child adjusting to the plan of adoption?

³² Idaho Code § 16-1513.

2. If the Plan is Relative or Foster Home Adoption

- ◆ What, if anything, remains to be done before the home is approved as the adoptive home?
- ◆ Can the adoption home study be waived and replaced with the kinship care or foster home study?
- ◆ Is there another person who spends significant time in the home involved with the family, and if so, has that individual been interviewed for appropriateness?
- ◆ Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
- ◆ What is the time frame for finalization?
- ◆ Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies?
- ◆ Will services follow the family if they move out of state?
- ◆ Is the adopting family aware of the details of all appropriate subsidy issues?

3. If an Adoptive Home has been Recruited

- ◆ A detailed description of the family. Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness?
- ◆ If the child is an Indian child, does the home meet the placement preferences list in ICWA, and if not, why not? What efforts have the agency made to identify a placement under ICWA?
- ◆ Has there been full disclosure to the adopting family of the child's circumstances and special needs?
- ◆ What remains to be done, if anything, to process and approve the home?
- ◆ What is the visitation and placement plan and its time frame? If visits have begun, how are the child and the adopting family adjusting?
- ◆ If the family's ethnicity is different from the child's, what efforts will be made to ensure relationships between the child and others of the same ethnicity? Does the adopting family understand the special aspects of the child's ethnicity?
- ◆ If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
- ◆ Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?
- ◆ After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adopting family agreeable to any contact plan with the biological parent(s) that may have been Recommended?

4. If an Adoptive Home must be Recruited

- ◆ What efforts are being made to identify potential adoptive homes, both locally and in other jurisdictions? On what adoption exchanges and internet sites is the child listed?
- ◆ What other efforts such as newspapers, television spots, and match parties are being made?

- ◆ If the child is an Indian child, what efforts are being made to identify potential adopting homes in the child's tribal community and what efforts are being made by IDHW to comply with ICWA placement preferences?
- ◆ What is the status of investigating adults with whom the child has or has had a positive relationship with regard to their potential to become adopting families?
- ◆ How many potential families have expressed interest in the child, and what is the status of the investigation of each family?

I. Findings and Conclusions

Because of the complexity of findings and conclusions in a termination of parental rights case, it will probably not be possible to write and distribute the findings to parties in the courtroom at the end of the hearing. However, when possible, it is recommended that the court give a verbal statement at the end of the hearing as to how it intends to rule. The final order arising from the termination of parental rights trial should be issued within 14 days of the close of the hearing. This time frame is achievable when the judge has already reserved time on the calendar (e.g. when the case was set for trial) to write its decision.

Findings of fact and conclusions of law should be set forth in language understandable by the parties and with clear and complete detail that is sufficient to withstand appellate review. Termination of parental rights hearing entries should be divided into two separate sets of findings. The first set of findings should include:

- ◆ Persons present and how absent parties were provided with appropriate notice, paying particular attention to any biological parent, tribal representative, or Indian custodian not present.
- ◆ If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment was voluntary and informed.³³
- ◆ Whether reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that *based on family circumstances and child health and safety, all reasonable efforts were made.*³⁴
- ◆ If the case went to trial, whether termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case. For Indian children, findings must include the special requirements of ICWA.
- ◆ Why termination of parental rights and adoption is in the best interests of the child.

When termination of parental rights is granted, the following additional findings addressing the plans to finalize a permanent placement should be made in a separate entry:

- ◆ What is being done to ensure that reasonable efforts are being made to find an adoptive home and to finalize the permanent placement, with specific steps and time frames that are to occur.
- ◆ A description of any special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs, and who is responsible for providing each service.
- ◆ The date and time of the next review to be set within 90 days.³⁵

³³ For Indian children, this must include the special requirements of ICWA described in section F of this chapter.

³⁴ *Id.*

J. Avoiding Appeals

Termination of parental rights has been compared to a death penalty in terms of impact and severity on birth parents. Even with fairness in procedures, competent attorneys, and full disclosure of facts related to the case, a significant percentage of involuntary termination cases will be appealed. By their nature, appeals create another layer of process and potential for delay in achieving permanence for the child. Delays can occur in preparation of transcripts and assembling the record for appeal. Even though a number of appellate courts have instituted 'fast tracking' of termination cases through direct appeal to a designated court and expedited hearings, the process still takes months.³⁶ All of these issues delay permanence for a child and extend the period of uncertainty for the child and the adopting family.

The best way to avoid the delay of appeals is to avoid the appeal being filed. The following list summarizes points made throughout this Manual that can help to avoid appeals:

- ◆ institute relinquishment counseling for parents beginning early in a case;
- ◆ require mediation or another alternative dispute resolution process after termination of parental rights becomes part of the permanent plan;
- ◆ conduct procedurally correct hearings and be scrupulous about due process and evidentiary rulings;
- ◆ ensure competent representation of parties throughout the child protection case; and
- ◆ make clear and legally-sufficient findings of fact, including reasonable efforts findings and conclusions of law, at each hearing (including all ICWA requirements).

K. Termination of Parental Rights Hearing Checklist

Who should be present

- ◆ the judge who has monitored the case from the first hearing;
- ◆ the child;
- ◆ parent(s);
- ◆ attorneys for the parent(s);
- ◆ if an Indian child, the child's tribe, the attorney for the child's tribe, if any, and the Indian custodian;
- ◆ assigned IDHW caseworker(s);
- ◆ prosecuting attorney or deputy attorney general;
- ◆ guardian *ad litem* for the child, whether attorney, social worker, or other paid non-attorney, or CASA;
- ◆ attorney for the child, if applicable;
- ◆ foster parent(s), legal risk foster parent(s), or adoptive parent(s);
- ◆ relatives who are caretakers of the child or who are involved in an adoption with contact agreement, when applicable;
- ◆ court reporter or suitable recording technology; and

³⁵ The review hearing process described in this manual must continue as long as the child continues in the custody of IDHW. Idaho Code § 16-1611.

³⁶ As this manual goes to press, the Idaho Appellate Rules committee is considering an expedited appeals process for child protection and termination cases.

- ◆ court security and other court staff.

Questions that must be answered to determine whether grounds exist for termination of parental rights and whether termination and adoption are in the best interests of the child.

- ◆ When mediation results in voluntary relinquishment of parental rights:
 - Was the parental consent to relinquishment voluntary and informed?
 - Have both biological parents consented to relinquishment?
 - Why is relinquishment and adoption in the best interests of the child?
 - Is there a recommendation for adoption with contact?
 - How is this recommendation, or lack thereof, in the best interests of the child?
- ◆ For Indian children, the court must comply with the requirements of ICWA, 25 U.S.C. § 1913, which states that voluntary relinquishments must be:
 - Executed in writing;
 - Recorded before a judge and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian;
 - Certified by the court that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood; and
 - Any consent given prior to or within 10 days after the birth of the child shall not be valid.
- ◆ When the case goes to trial pursuant to Idaho Code § 16-2005, the grounds for termination in Idaho are:
 - abandonment of the child by willfully having failed to maintain a normal relationship, including failure to maintain reasonable support and regular personal contact;
 - failure to maintain a normal relationship without just cause for one year is prima facie evidence of abandonment;
 - neglect or abuse of the child such that the child “lacks the parental care necessary for his health, morals and well-being”;
 - the parent is unable to discharge her or his parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that the condition will continue for a prolonged period of time and will be injurious to the child’s health, morals, or well-being; or
 - where termination is filed by a parent or through an authorized agency, if termination is found to be in the best interests of the child.
- ◆ Idaho Code § 16-2005(h) provides that there is a rebuttable presumption that termination of parental rights is in the child’s best interests in any of the following situations:
 - the parent has caused the child to be conceived as a result of rape, incest, lewd conduct with a minor under 16, or sexual abuse of a child under 16;
 - a parent murdered or intentionally killed the other parent of the child;
 - a parent has been convicted of murder or voluntary manslaughter of a sibling of the child or has aided, abetted, conspired, or solicited to commit such murder or voluntary manslaughter;

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- a parent has been convicted of a felony assault and battery which resulted in serious bodily injury to the child or a sibling;
 - a parent is incarcerated with no possibility of parole; or
 - a court determines the child is an abandoned infant.
- ◆ Additional questions that must be answered when termination motions go to trial include:
- Were all parties properly identified and served?
 - Does the evidence presented show that statutory grounds for termination of parental rights exist?
 - Were reasonable efforts made to reunify?
 - Is termination of parental rights in the best interests of the child?

Questions that must be answered to determine whether reasonable efforts are being made toward adoption and to finalize the permanent plan.

- ◆ In all Cases, What are the Child's Special Needs?
- Current health and educational information;
 - A description of the child's current placement;
 - Description of the services that have been provided to the child, the progress the child has made, and the issues still to be addressed, including cultural needs; and
 - Has the child received counseling with regard to termination of parental rights, and how is the child adjusting to the plan of adoption?
- ◆ If the Plan is Relative or Foster Home Adoption
- What, if anything, remains to be done before the home is approved as the adoptive home?
 - Can the adoption home study be waived and replaced with the kinship care or foster home study?
 - Is there another person who spends significant time in the home involved with the family, and if so, has that individual been interviewed for appropriateness?
 - Has there been full disclosure to the relative or foster parent regarding the child's history and any current or potential disabilities?
 - What is the time frame for finalization?
 - Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies?
 - Will services follow the family if they move out of state?
 - Is the adopting family aware of the details of all appropriate subsidy issues?
- ◆ If an Adoptive Home has been Recruited
- A detailed description of the family. Is there another person who spends significant time in the home, and if so, has that individual been interviewed for appropriateness?
 - If the child is an Indian child, does the home meet the placement preferences list in ICWA, and if not, why not? What efforts have the agency made to identify a placement under ICWA?
 - Has there been full disclosure to the adopting family of the child's circumstances and special needs?

- What remains to be done, if anything, to process and approve the home?
 - What is the visitation and placement plan and its time frame? If visits have begun, how are the child and the adopting family adjusting?
 - If the family's ethnicity is different from the child's, what efforts will be made to ensure relationships between the child and others of the same ethnicity? Does the adopting family understand the special aspects of the child's ethnicity?
 - If the home is in another locality from where the child currently lives, what are the plans to meet the child's educational and special needs for services? How will the educational and service transition occur?
 - Have all appropriate subsidies been identified and has all paperwork been completed with regard to these subsidies? Will services follow the family if they move out of state? Is the adopting family aware of the details of all appropriate subsidy issues?
 - After placement in the adoptive home, what contact will the child have with the prior caretaker and others who have had positive relationships? Is the adopting family agreeable to any contact plan with the biological parent(s) that may have been Recommended?
- ◆ If an Adoptive Home must be Recruited
- What efforts are being made to identify potential adoptive homes, both locally and in other jurisdictions? On what adoption exchanges and internet sites is the child listed?
 - What other efforts such as newspapers, television spots, and match parties are being made?
 - What is the status of investigating adults with whom the child has or has had a positive relationship with regard to their potential to become adopting families?
 - How many potential families have expressed interest in the child and what is the status of the investigation of each family?

Findings and Conclusions

- ◆ Persons present and how absent parties were provided with appropriate notice, paying particular attention to any biological parent, tribal representative, or Indian custodian not present.
- ◆ If there was a voluntary relinquishment of parental rights, efforts made by the court to ensure the relinquishment was voluntary and informed.
- ◆ Whether reasonable efforts were made to reunify the family. If no efforts were reasonable, a statement that *based on family circumstances and child health and safety, all reasonable efforts were made.*
- ◆ If the case went to trial, whether termination of parental rights is granted. If so, under what statutory grounds and the specific reasons why the statute applies in this case. For Indian children, findings must include the special requirements of ICWA.
- ◆ Why termination of parental rights and adoption is in the best interests of the child.

When termination of parental rights is granted, the following additional findings addressing the plans to finalize a permanent placement should be made in a separate entry:

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- ◆ What is being done to ensure that reasonable efforts are being made to find an adoptive home and to finalize the permanent placement, with specific steps and time frames that are to occur.
- ◆ A description of any special factors or conditions of the child that are identified as special needs, what services are to be provided to address these needs, and who is responsible for providing each service.
- ◆ The date and time of the next review to be set within 90 days.

L. Suggested Questions For Voluntary Termination Of Parental Rights

Are you the birth parent of the child named in the consent form?

When and where was the child born?

(May be advisable to wait at least 72 hours after birth, to establish that the parent was not rushed into courtroom while still under the emotional stress of childbirth.)

How old are you? What is your educational background? What do you do for a living?

Do you understand why you are here today? Can you tell me in your own words what you are here to do?

Are you under the influence of any medicine, drug, alcohol, or any other substance that might affect your state of mind?

Do you have any mental or physical illness that might affect your ability to decide what you want to do?

Did you see the child after birth? (Or, have you seen the child recently?)

If not, did someone prevent you from seeing the child, or did you make your own decision not to see the child?

If so, were you satisfied about the child's health, condition, and appearance? Did seeing the child make you change your mind about giving up the child?

When did you decide to sign the consent to termination? Have you had enough time to think about it? Do you want more time to think about it?

Has anyone in any way tried to improperly pressure you into signing the consent to terminate?

(Note: Threats to take lawful action, such as enforcement of child support, do not constitute duress.)

Have you talked to a lawyer to get legal advice about this? If not, do you want to?

(Some judges offer to find an attorney who will talk to them without charging a fee. They are seldom taken up on the offer, and on the rare occasion when they are, can usually find one fairly easily.)

Do you have a friend or family member that you like to talk to when you need to make an important decision? Did you talk to them? Is there someone you want to talk to before you do this?

Do you understand that you will be giving up ALL your rights concerning this child? You will not have the right to contact the child, to be notified of anything concerning the child, or to be involved in any decisions concerning the child, NOT ANYTHING.

Do you understand that you will be giving up all your rights to your child FOREVER? Once you sign this document, if you later change your mind, it will be extremely difficult, and maybe impossible, to undo the termination.

Do you understand that by terminating your rights as a parent, you are opening the door for someone else to adopt the child? Do you understand that unless it is an open adoption, you will not know who the adopting parents are?

Do you think this is in the child's best interests? Why?

Do you think this is in your best interests? Why?

Are you a member of an Indian tribe, or are you eligible for membership in an Indian tribe? If so, what tribe? If it is possible that the child might be of Indian heritage, is there anyone who might have more information about the child's Indian heritage? How can that person be contacted?

Have you seen and carefully read the consent form? Would you read it again now? Take as much time as you need to read it carefully.

Is there anything in the form that you don't understand or with which you do not agree?

Do you still want to terminate your parental rights?